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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)**

THE PEOPLE,

Plaintiff and Respondent,

v.

EDWARD JOHN THOLL,

Defendant and Appellant.

C085995

(Super. Ct. No. 15F02229)

After a jury trial, defendant Edward John Tholl was found guilty of committing numerous sex crimes against four minor victims over the course of 10 years. The trial court sentenced him to an aggregate term of 70 years eight months in state prison.

On appeal, defendant contends the judgment must be reversed because the trial court erred in denying his postconviction motion for the appointment of substitute counsel under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*), there was insufficient evidence to support two of his convictions, the trial court committed instructional error,

the prosecutor engaged in misconduct by violating a pretrial order and misstating the law to the jury, the trial court erred in requiring him to testify before his defense expert, and the trial court incorrectly calculated his presentence custody credits. We agree with defendant that the trial court erred in denying his *Marsden* motion. The error requires conditional reversal. Because of this disposition, we decline to address defendant's remaining contentions as premature.

FACTUAL AND PROCEDURAL BACKGROUND

The resolution of this appeal requires only a brief recitation of the underlying facts. From 1996 to 2006, defendant repeatedly sexually abused four minor boys. Two of the victims, S.V. and Z.V., are brothers. Defendant is the stepbrother of their stepfather. The two other victims were friends of S.V. and Z.V.

The sexual abuse included oral copulation by force, exposing and touching of genitals, and sodomy. Defendant also convinced the victims to take pictures of their genitals and to masturbate in front of him. He also took pictures of their genitals and made videos of them, including videos of them masturbating.

When S.V. was 22 years old, he confronted defendant about the abuse. Defendant apologized and offered him \$50,000 if he agreed not to tell anyone. However, when S.V. later demanded the money from defendant and threatened to report him, defendant accused him of extortion and denied abusing him.¹ Thereafter, S.V. reported the abuse to the police.

Defendant was charged by a second amended felony information with 15 sex crimes: six counts of forcible lewd and lascivious conduct with a child under the age of

¹ Prior to trial, the trial court granted the prosecutor's request to give S.V. immunity against a charge of extortion.

14 years (Pen. Code, § 288, subd. (b)(1)),² eight counts of lewd and lascivious conduct with a child under the age of 14 years (§ 288, subd. (a)), and one count of sodomy with a person under the age of 18 (§ 286, subd. (b)(1)).

Following a jury trial, defendant was found guilty on all counts. The trial court sentenced him to an aggregate term of 70 years eight months in prison.

Defendant filed a timely notice of appeal.

DISCUSSION

Defendant contends that conditional reversal of the judgment is required because the trial court erred in denying his postconviction motion for appointment of substitute counsel under *Marsden*. We agree.

1.0 Applicable Law and Standard of Review

“[C]riminal defendants are entitled under the Constitution to the assistance of court-appointed counsel if they are unable to employ private counsel.” (*Marsden, supra*, 2 Cal.3d at p. 123.) This constitutional right encompasses the right to have court-appointed counsel discharged and replaced by another attorney. (*Ibid.*) In California, the seminal case regarding the appointment of substitute counsel is *Marsden*, which gave rise to the term of art, a “ ‘*Marsden* motion.’ ” (*People v. Smith* (1993) 6 Cal.4th 684, 690 (*Smith*).)

When a defendant files a *Marsden* motion or otherwise clearly indicates his desire for appointment of substitute counsel, the court must hold a hearing to allow the defendant to state the reasons why he believes counsel should be discharged. (*People v. Sanchez* (2011) 53 Cal.4th 80, 89-90 (*Sanchez*); *People v. Mendoza* (2000) 24 Cal.4th 130, 156-157, superseded by statute on another ground as stated in *People v. Brooks*

² Undesignated statutory references are to the Penal Code.

(2017) 3 Cal.5th 1, 62-63, fn. 8.) “This hearing requirement stems from *Marsden* itself, which gave rise to the term of art ‘*Marsden* hearing’ to describe the proceeding at which such requests are to be resolved.” (*People v. Armijo* (2017) 10 Cal.App.5th 1171, 1179.) “ “[A] *Marsden* hearing is . . . an informal hearing in which the court ascertains the nature of the defendant’s allegations regarding the defects in counsel’s representation and decides whether the allegations have sufficient substance to warrant counsel’s replacement.” ’ ” (*People v. Gutierrez* (2009) 45 Cal.4th 789, 803.)

“Once a defendant is afforded an opportunity to state his . . . reasons for seeking to discharge an appointed attorney, the decision whether or not to grant a motion for substitution of counsel lies within the discretion of the trial judge. The court does not abuse its discretion in denying a *Marsden* motion ‘ “unless the defendant has shown that a failure to replace counsel would substantially impair the defendant’s right to assistance of counsel.” ’ [Citations.] Substantial impairment of the right to counsel can occur when the appointed counsel is providing inadequate representation or when ‘the defendant and the attorney have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citation].’ ” (*People v. Clark* (2011) 52 Cal.4th 856, 912.)

A defendant’s tactical disagreements with counsel are not grounds for granting a *Marsden* motion (*People v. Dickey* (2005) 35 Cal.4th 884, 922), although it is possible for tactical disagreements to be substantial enough to “signal . . . a breakdown in the attorney-client relationship of such magnitude as to jeopardize the defendant’s right to effective assistance of counsel” (*People v. Barnett* (1998) 17 Cal.4th 1044, 1095).

The defendant’s right to seek the discharge and replacement of court-appointed counsel applies at all stages of a criminal proceeding. The request thus may be made before or after a defendant is convicted. (*Smith, supra*, 6 Cal.4th at pp. 692, 694.)

When a *Marsden* motion is granted, new counsel is substituted for all purposes in place of the original attorney, who is then relieved of further representation. In the postconviction context, substitute counsel can investigate a possible motion to withdraw the plea or a motion for new trial based upon ineffective assistance of counsel. (*Smith, supra*, 6 Cal.4th at pp. 695-696; see *People v. Reed* (2010) 183 Cal.App.4th 1137, 1149-1150 (*Reed*) [when new counsel is appointed after a verdict but before judgment is entered, new counsel may move for a new trial on the grounds former counsel was ineffective].)

2.0 Additional Background

At the sentencing hearing on October 6, 2017, defense counsel advised the trial court that he had a “gentleman’s disagreement” with defendant about whether a motion for new trial should be filed. Counsel indicated that some of defendant’s concerns involved counsel’s performance but noted that defendant was not “specifically asking for a *Marsden* motion.” Rather, defendant felt that a motion for new trial was warranted. In response, the court stated, “Now, ordinarily I think under these circumstances I would inquire in camera of [defendant], but what you’ve indicated to me, [defense counsel], is that [defendant] is not requesting . . . a *Marsden* motion, but rather there’s a disagreement about the new trial motion. I’m happy to go in camera, but I would just say this—and it may not even be necessary—if the issue includes the possibility of your specific performance, obviously there is a conflict in you investigating your own specific performance, so the Court is certainly willing under these circumstances to appoint counsel to investigate the potential of a new trial motion on that basis or any other basis that new appointed counsel . . . find[s] after review of the record and so forth.” After defense counsel indicated that he was comfortable with this procedure and conferred with defendant, the trial court appointed conflict counsel and continued the matter six weeks.

In doing so, the court noted that conflict counsel needed time to review the trial transcripts and to meet with defendant.

On November 3, 2017, conflict counsel sent an email to defense counsel and the prosecutor stating, in relevant part, as follows: “The purpose of this email is to advise the court and counsel that after reviewing the trial transcript and other material I will not be filing a motion for a new trial in this case. [¶] I have advised [defendant] of my decision.” A printout of the email was filed with the trial court on the same day. The email does not indicate whether conflict counsel met with defendant or had any discussion with him about his concerns regarding appointed counsel’s representation. The record, however, reflects that conflict counsel had “conversations” with defense counsel.

At the outset of the continued sentencing hearing on November 17, 2017, the trial court held a *Marsden* hearing at defendant’s request. When asked whether he wanted his counsel to be relieved and new counsel appointed, defendant stated that he was unsure how a *Marsden* hearing “works.” He noted that he had no problems with counsel on a personal level but felt that some of counsel’s decisions “cost [him] the case.” He explained, “Primarily one of [counsel’s] main concerns that he always said when I would suggest something to do was basically . . . *I don’t want more people saying bad things about you or I don’t want them to hear more bad things about you, ‘cause all these people are going to do is say bad things about you. And it’s like but they’re lying and we can prove it [in] certain ways. And he would say I make the decisions and we’re going to go with what I want to do.*”

After defendant made some remarks about potential witnesses who did not testify at trial, including a witness who “started the extortion against [him]” and got “[S.V.] to go in with him on it,” the trial court interrupted him. The court stated, “Let me stop you for just a second . . . so we can frame what it is you’re doing here today. You’re on for

judgment and sentence. So the only question is whether or not you want [defense counsel] to represent you for judgment and sentence, and if not, why not? That's what I need to know. [¶] The other things you're bringing up ha[ve] to do with issues in your case. Those are appealable issues. This just isn't the place for that. . . . [I]f . . . you believe there were mistakes made by the prosecutor, . . . [defense counsel], or by the Court, during the course of your trial, those are things that can be brought up on appeal, which is a little different than do you today want someone else to represent you for judgment and sentence."

When defendant indicated that he did not have that specific discussion with counsel, as their conversation was "more or less" about his wanting a new attorney, the court stated, "If you were afforded a new attorney today, a new attorney comes in and represents you for judgment and sentence. That doesn't mean you go back and relitigate the issues that have already been presented to the jury. [¶] So we're at a certain point of the proceeding, and the question for the Court today is do you want [defense counsel] to represent you for judgment and sentence, or are you asking that [defense counsel] be relieved for judgment and sentence for some specific purpose and another attorney brought in to represent you for your sentencing? [¶] All those other things, those are appeal issues, it sounds like to me. . . . [T]his would not create a new trial."

In response, defendant stated he was very frustrated because he believed he did not receive a fair trial. He explained that there was "stuff in discovery" that defense counsel did not bring up that would have proved his innocence. Defendant also complained that counsel failed to ask questions that needed to be asked, including questions that would have allowed him to explain things and counter the prosecutor's assertion that he was guilty because he engaged in certain conduct. After the trial court noted that defendant was raising "an appealable issue" and was addressing the trial proceedings and not the judgment and sentencing aspect of the proceedings, defense counsel stated, "I think

[defendant] . . . is desirous of a new attorney who will appear and file a motion for new trial on his behalf. I think that's why he wants me substituted so that an attorney will take action on that.”³ The court replied, “One of the steps that the Court took at the last date for judgment and sentence was to appoint new counsel to review the record . . . to see whether or not [conflict counsel] could find in the record any support for a motion for new trial. [¶] [Conflict counsel] did that and reported to the Court that he would not be filing a motion for new trial. [¶] So at this point, we're up to judgment and sentence. [¶] And I can appreciate your frustration, [defendant], but at this point we're at judgment and sentence, and . . . we're not talking about . . . a motion for a new trial. We've done that.”

When defendant complained that conflict counsel only reviewed the trial transcript, which “doesn't show all the things that could have or should have been done that would have exonerated [him],” the court said, “[D]o you want [defense counsel] to represent you for judgment and sentence? That's where we are.” Defendant indicated that he was confused and upset about the proceedings and did not know what to say. In response, the trial court stated, “Well, thus far I have not heard any reason that [defense counsel] is not able to represent you for judgment and sentence. He certainly has the background and experience to do so. [¶] And I've heard from both of you that you've both been very cordial and there hasn't been any particular personal issue. It's not a personal problem. [¶] So I have not heard any reason why the Court would otherwise exclude [defense counsel] or relieve [defense counsel] and have someone else come in for the purpose of judgment and sentence. [¶] I already had somebody come in and review the record for a motion for new trial, so now it would be only a question of

³ In making this comment, defense counsel noted that defendant could correct him if he was misstating defendant's request. Defendant did not do so.

whether or not I have someone come in to sit in [defense counsel's] place for judgment and sentence.”

After defense counsel conferred with defendant, the trial court asked if there was anything that defendant would like to add. In response, he said, “Oh, I got tons, but nothing about that, no.” The court replied, “Okay. All right. Then based on what I’ve heard, there does not appear to be any basis for relieving [defense counsel]. There does not appear to be a breakdown in the relationship between attorney and client. [¶] The *Marsden* motion is denied.”

3.0 Analysis

We conclude *Marsden* error occurred. Since defendant brought an issue of potential ineffective assistance of counsel to the trial court’s attention and his desire for substitute counsel to file a motion for a new trial on that basis, the court should have evaluated whether defense counsel had acted incompetently and, if so, appointed new counsel to represent defendant during the remainder of the proceedings. While the court, at the continued sentencing hearing, conducted a *Marsden* hearing in response to defendant’s request, it did not explore the specific reasons supporting defendant’s claim of inadequate representation and consider appointing substitute counsel for the purpose of preparing a motion for new trial on that basis. Instead, the court focused on whether substitute counsel should be appointed for the purpose of judgment and sentence because, in the court’s view, defendant had raised appealable issues and conflict counsel had determined that a motion for new trial was not warranted. This was error.⁴

⁴ We note the trial court erred in appointing “conflict” counsel to evaluate whether a motion for new trial was warranted. In *Sanchez*, our Supreme Court specifically disapproved of such a procedure. (See *Sanchez, supra*, 53 Cal.4th at pp. 84, 89.) The *Sanchez* court stated, “ ‘[T]he trial courts . . . should abandon their reliance on counsel specially appointed to do the trial court’s job of evaluating the defendant’s assertions of incompetence of counsel and deciding the defendant’s new trial . . . motion.’ ” (*Id.* at

Where, as here, a defendant provides the trial court with “ ‘some clear indication’ ” of his desire for substitute counsel, the court must hold a *Marsden* hearing to allow the defendant to explain the basis for the request. (*Sanchez, supra*, 53 Cal.4th at pp. 89-90.) Although the decision whether to permit a defendant to discharge his appointed counsel and substitute another attorney is within the discretion of the trial court, the court “cannot thoughtfully exercise its discretion . . . without listening to [the defendant’s] reasons for requesting a change of attorneys. A trial judge is unable to intelligently deal with a defendant’s request for substitution of attorneys unless he [or she] is cognizant of the grounds which prompted the request. The defendant may have knowledge of conduct and events relevant to the diligence and competence of his attorney which are not apparent to the trial judge from observations within the four corners of the courtroom. Indeed, ‘[w]hen inadequate representation is alleged, the critical factual inquiry ordinarily relates to matters outside the trial record: whether the defendant had a defense which was not presented; whether trial counsel consulted sufficiently with the accused, and adequately investigated the facts and the law; whether the omissions charged to trial counsel resulted from inadequate preparation rather than from unwise choice of trial tactics and strategy.’ [Citation.] Thus, a judge who denies a

p. 89.) We further note that, contrary to the trial court’s apparent belief, defendant’s claim of inadequate representation was not merely an appealable issue. In *Smith*, our Supreme Court explained, “We stress . . . that the trial court should appoint substitute counsel when a proper showing has been made at any stage. A defendant is entitled to competent representation at all times, including presentation of a new trial motion or motion to withdraw a plea. . . . [J]ustice is expedited when the issue of counsel’s effectiveness can be resolved promptly at the trial level. In those cases in which counsel *was* ineffective, this is best determined early. Thus, when a defendant satisfies the trial court that adequate grounds exist, substitute counsel should be appointed. Substitute counsel could then investigate a possible motion to withdraw the plea or a motion for new trial based upon alleged ineffective assistance of counsel. Whether, after such appointment, any particular motion should actually be made will, of course, be determined by the new attorney.” (*Smith, supra*, 6 Cal.4th at pp. 695-696.)

motion for substitution of attorneys solely on the basis of his [or her] courtroom observations, despite a defendant's offer to relate specific instances of misconduct, abuses the exercise of his [or her] discretion to determine the competency of the attorney. A judicial decision made without giving a party an opportunity to present argument or evidence in support of his contention 'is lacking in all the attributes of a judicial determination.' ” (*Marsden, supra*, 2 Cal.3d at pp. 123-124.)

To ensure that the right to discharge and replace appointed counsel is meaningful, the defendant must “be given ample opportunity to explain and if possible to document the basis of his contention . . . [beyond the] bare complaint[s]” that counsel did not provide adequate assistance. (*Marsden, supra*, 2 Cal.3d at p. 125.) Denial of that opportunity is legal error that compels reversal of the defendant's conviction unless the record shows beyond a reasonable doubt that the error was harmless. (*Id.* at p. 126; *Reed, supra*, 183 Cal.App.4th at p. 1148.)

We cannot conclude that the trial court's error was harmless beyond a reasonable doubt. On this record, it is possible defendant could have demonstrated that appointment of substitute counsel was warranted. His complaints about the adequacy of counsel's representation could have supported a motion for new trial based on ineffective assistance of counsel. Because the trial court did not make an inquiry as to defendant's specific complaints about counsel's representation and listen to counsel's responses, it is unclear whether defendant could have presented evidence or otherwise shown “knowledge of conduct and events relevant to the diligence and competence of his attorney which are not apparent” from his “bare complaint[s]” that would have tipped the balance in favor of appointment of substitute counsel. (*Marsden, supra*, 2 Cal.3d at p. 123; *id.* at p. 125.) Under these circumstances, we cannot speculate upon the basis of an inadequate record that the trial court, after listening to defendant's reasons, would decide the appointment of new counsel was unnecessary. (See *People v. Winbush* (1988) 205 Cal.App.3d 987,

991.) Accordingly, the trial court’s error cannot be deemed harmless beyond a reasonable doubt. (See *Sanchez, supra*, 53 Cal.4th at p. 92 [prejudicial error to deny a motion for substitution of counsel solely on the basis of courtroom observations, despite a defendant’s offer to relate specific instances of misconduct].) Other courts have reached a similar result where, as here, the defendant was not provided an opportunity to explain the specific reasons supporting the appointment of substitute counsel. (See, e.g., *People v. Knight* (2015) 239 Cal.App.4th 1, 4-5, 9; *People v. Hill* (2013) 219 Cal.App.4th 646, 649, 653; *Reed, supra*, 183 Cal.App.4th at pp. 1144-1145.)

Given the potential that defendant could demonstrate that the appointment of substitute counsel is warranted during a *Marsden* hearing where he is allowed to articulate his specific reasons to discharge appointed counsel, we follow the approach approved by our Supreme Court in *Sanchez* as the “proper disposition.” (*Sanchez, supra*, 53 Cal.4th at p. 93.) Thus, we will conditionally reverse the judgment and remand with directions for further proceedings. (*Id.* at pp. 92-93.)

DISPOSITION

The judgment is conditionally reversed and the case remanded for the trial court to hold a *Marsden* hearing on defendant’s postconviction *Marsden* motion. If the court finds defendant has shown that a failure to replace his appointed attorney would substantially impair his right to assistance of counsel, the court shall appoint new counsel to represent him for all purposes and shall entertain such applications as newly appointed counsel may make, including a motion for new trial. If newly appointed counsel makes no motions, or any motions made are denied, or defendant’s *Marsden* motion is denied, the court shall reinstate the judgment.

Because of this disposition, we decline to address defendant's remaining contentions as premature.

BUTZ, J.

We concur:

RAYE, P. J.

MAURO, J.